IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN INSOLVENCY

NOTICE OF MOTION NO. 62 OF 2005

IN

INSOLVENCY NOTICE NO. N/49 OF 2005

Re: Bhupendra C. Dalal
...Judgment debtor

Ex-parte :

Satish Tandon and Ors. ...Judgment creditors.

NOTICE OF MOTION NO. 63 OF 2005

IN

INSOLVENCY NOTICE NO. N/50 OF 2005

Re: Bhupendra C. Dalal
...Judgment debtor

Ex-parte :

Satish Tandon and Ors. ...Judgment creditors.

S.L. Mhatre i/by. Doijode and Associates
for judgment creditors.
S.R. Mishra for judgment debtor.

CORAM: S.U. KAMDAR, J.

DATED: 18TH APRIL, 2006.

P.C. :

1. The present Notice of Motion has been taken out for setting aside the Insolvency Notice No. N/49 of 2005 dated 11.2.2005. The said notice has been initiated on the basis that there is a decree passed in Suit No. 8 of 1995 passed by Special Court under the provisions of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992. Against the order and decree passed by the special court for a sum of Rs.23,53,743.26/- an appeal has been filed before the Supreme court being Civil Appeal No. 296-298 of 2003. By orders dated 7.3.2006 and 23.3.2006 the apex court has passed an interim order continuing the present insolvency proceedings but directed that no final order should be passed in the present proceedings. The learned judgment debtor has produced the orders before me. The order dated 7.3.2005 reads as under :

" Put up this matter on 23.3.2006. In the meantime the insolvency proceedings may continue but the final order may not be passed therein."

2. The said interim order is further continued by another order dated 23.3.2006 which reads as under :

. "Issue Notice. Interim order to continue."

3. The learned counsel for the judgment debtor has contended that in view of the Supreme Court order set out hereinabove this court cannot pass any order in the present Notice of Motion which has been taken out by the judgment debtor himself for setting aside the insolvency notice.

4. In my opinion the contention raised by the learned counsel for the judgment debtor is

contrary to the order dated 23.3.2006 passed by the apex court itself. By the said order he apex court has expressly permitted continuation of insolvency proceedings but not to pass a final order. In my opinion order on the Notice of Motion is not a final ordfer of adjudication in insolvency proceedings. The Insolvency proceedings are commenced by a notice under Section 9 of the Presidency Towns Insolvency Act and are culminated by passing a final order of adjudication in the insolvency petition. The apex court has by an order dated 23.3.2006 expressly permitted the continuation of insolvency proceedings but final order cannot be passed. In my opinion the final order which can be passed in the insolvency proceedings is that of an order of adjudicating him as an Insolvent which cannot be passed by virtue of the Supreme court order dated 23.3.2006. I do not find that the said order prevents me from deciding the present Notice of motion wherein the only question is that whether the insolvency notice initiated under Section 9 should be set aside or not. Even if I dispose off

the motion by rejecting the same still the adjudication order will be required to be passed in the insolvency proceedings which in my opinion cannot be done by virtue of the order of the apex court dated 23.3.2006. Even if I accept the argument of the learned judgment debtor then in that event the order of the apex court requires to be read as if the entire proceedings in insolvency has been stayed which in my opinion cannot be done because of order expressly provides for continuation of insolvency proceedings. In that light of the matter the objection raised by the judgment debtor is required to be rejected. In the light of the aforesaid fact I do not find any reason for not deciding the present Notice of Motion because of the order dated 7.3.2006 as continued by a further order dated 23.3.2006.

5. The next contention which has been raised by the learned counsel for the petitioner is that by virtue of the provisions of sub-secction 5 of Section 9 of the Presidency Towns Insolvency Act, particularly sub-clause (b) thereof the present

Notice of Motion should be made absolute. He has submitted that under sub-section 5 it is open to a person who is served with a notice of insolvency to apply for setting aside of the notice if he has made an application before the competent authority under the law for setting aside of the decree or order. He has submitted that he has filed an appeal in the apex court against the decree passed and therefore under sub-section 5(b) of Section 9 of the Presidency Towns Act the application should be made absolute. In my opinion the provisions of sub-section 5(b) empowers a party to apply for setting aside the insolvency notice on the grounds which are set out including Clause (b) thereof. The said section 5(b) in those cases where by virtue ofany law a relief of indebtedness has been conferred. The provision has no application in cases where there is no relief conferred from indebtedness by virtue of a stature. It does not mean that mere filing of an application for setting aside the order or decree under civil law would by itself automatically empower him to get the motion made absolute as contended by the

learned counsel for the judgment debtor. The said submission made on the basis of the aforesaid provision is thus maintainable in law. In absence of any stay of any order or decree in my opinion under the insolvency Act the proceedings continues and motion cannot be made absolute merely on the ground that such an application for setting aside the decree or order has been made by the judgment debtor. In the present case infact an application for stay has been made by the judgment debtor and by an order dated 7.3.2006 a qualified stay has been granted by the Supreme court and expressly permitted the insolvency proceedings to continue without passing the final order therein.

6. The third contention advanced by the learned counsel for the judgment debtor is based on Section 17 of the Presidency Towns Act. In my opinion the provisions of Section 17 of the Act is required to be considered at the time of passing final order in the insolvency proceedings which is to be presented by the judgment creditor. At this juncture it is not necessary to go into the

provisions of Section 17 of the Presidency Towns Insolvency Act vice-a-versa the rights of the custodian under the provisions of Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992 and in view of the fact that the apex court has by an order dated 7.3.2006 expressly provided that no final order to be passed in insolvency proceedings, In my opinion that issue cannot be determined at this stage. It has also been contended by the learned counsel for judgment debtor that by virtue of an addressing letter dated 12.3.2003 by the judgment creditor to the custodian and seeking the distribution of the amount under Section 11 it is not open to the judgment creditor to apply for insolvency proceedings. In my opinion the submission is required to be rejected for the simple reason that insolveny proceedings are not execution proceedings in personance. In fact these proceedings are of the character of proceedings in recovery. Thus mere addressing of letter by the judgment creditor seeking distribution of assets under the said Act would not entitle the judgment

debtor to set aside the Insolveny notice. In the light of the aforesaid I do not find any reason to entertain the present Notice of Motion. Motion is dismissed accordingly. No order as to costs.

****